

# STATE OF ALASKA

**DEPT. OF ENVIRONMENTAL CONSERVATION**  
**DIVISION OF WATER**  
**DIRECTOR'S OFFICE**

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January 23, 2012

The Honorable Gary Stevens  
President of the Senate  
Alaska State Legislature  
State Capitol, Room 111  
Juneau, Alaska 99801

The Honorable Mike Chenault  
Speaker of the House  
Alaska State Legislature  
State Capitol, Room 208  
Juneau, Alaska 99801

Dear President Stevens and Speaker Chenault:

This letter serves as the Department of Environmental Conservation's (DEC) seventh annual report to the legislature on efforts to obtain and implement state primacy for the National Pollutant Discharge Elimination System (NPDES) wastewater discharge program. This report highlights our first three years of effort since the Environmental Protection Agency (EPA) approved the state's program on October 31, 2008 – the Alaska Pollutant Discharge Elimination System (APDES) program. This report provides background information; a description of the program responsibilities transferred to the Department; permitting, compliance, and enforcement activities during the previous year; and an update on the petition to the U.S. Ninth Circuit Court regarding the approval of Alaska's NPDES primacy application.

## **Background**

The 24<sup>th</sup> Alaska Legislature passed Senate Bill 110 during its 1<sup>st</sup> regular session in 2005 directing DEC to seek primacy from the EPA for the NPDES wastewater discharge program. Governor Murkowski signed this legislation into law on August 27, 2005 with an effective date of November 25, 2005. Section 6 of the bill reads as follows:

REPORT TO THE LEGISLATURE. Until full authority for administering the National Pollutant Discharge Elimination System has been transferred to the Department of Environmental Conservation, the Department of Environmental Conservation shall submit, within 10 days after the date the Legislature convenes in regular session, a report to both houses of the Legislature and the governor that includes the following information:

- (1) the department's progress in preparing and submitting its application to the United States Environmental Protection Agency by June 30, 2006;
- (2) a description of the progress by the United States Environmental Protection Agency in reviewing the state's application and the expected or actual date and contents of the agency's approval; and
- (3) the progress made by the Department of Environmental Conservation and the United States Environmental Protection Agency during the five-year National Pollutant Discharge Elimination System program transition period, the identification of the program responsibilities that have been transferred to the Department of Environmental Conservation and the program responsibilities retained by the United States Environmental Protection Agency, whether the transition is proceeding on schedule, and identification of relevant statutory, regulatory, or financial impediments to obtaining National Pollutant Discharge Elimination System primacy as intended by the Legislature.

### **Work Group Involvement**

As required by Section 5 of SB 110, DEC will continue to confer as needed with the NPDES Primacy Work Group, which includes representatives of affected permittees. The Work Group was not convened in 2011.

The Work Group's members are listed at the DEC website at: [http://www.dec.state.ak.us/water/npdes/work\\_group.htm](http://www.dec.state.ak.us/water/npdes/work_group.htm), along with the 2005 Work Group Report.

### **Statutory, Regulatory, and Financial Issues**

No statutory or regulatory impediments to implement the program exist; however, DEC will occasionally need to make revisions in response to changes to the federal program to keep Alaska's program current. DEC's fiscal year 2013 budget request includes an additional \$372,100 to support permitting and compliance work associated with increased oil and gas activities.

### **Transfer of Authority**

EPA's October 2008 approval of the state's APDES program included transfer of permitting, compliance, and enforcement for specific dischargers in phases over a three-year period, rather than the five-year period envisioned in SB 110. The current schedule to transfer authority is:

Phase I: At program approval - October 31, 2008

Domestic discharges, seafood industry, and timber handling

Phase II: One year from program approval - October 31, 2009

Storm Water Program, Pretreatment Program, and miscellaneous industrial discharges

Phase III: Two years from program approval - October 31, 2010

Mining industry

Phase IV: Four years from program approval - October 31, 2012

Oil and gas industry and cooling water intakes and discharges

Phases I-III have successfully transferred from EPA to DEC. In March 2011, DEC proposed a one year extension of the transfer of Phase IV from the original transfer date of October 31, 2011 to October 31, 2012. EPA approved the extension in August, 2011. The extension will allow the resources of both EPA and DEC to be applied to the existing permit workload and ensure that timely permits will be available for Alaska's oil and gas industry.

EPA retains authority for a facility until the facility transfers to the state in accordance with the transfer schedule. DEC will have full authority to implement the APDES program for all transferred facilities on October 31, 2012.

Program responsibilities retained by EPA, after full authority for the NPDES program transfers to DEC, include permitting and enforcement authorities for facilities located in Denali National Park and Preserve, facilities located in Indian Country (Metlakatla), facilities operating outside state waters (generally greater than three miles offshore), and domestic facilities issued Clean Water Act §301(h) waivers from secondary treatment standards.

EPA has no authority to issue a permit to a facility where jurisdiction over that facility has transferred to the state; however, pursuant to the Clean Water Act, EPA retains authority to review all DEC-drafted permits and to conduct inspections and pursue an enforcement action on any discharger in Alaska.

### **Phases I, II, and III Program Implementation**

The APDES Program built on its successes during the previous year as the Department continued to issue permits for Phase I and Phase II facilities, as well as assume authority for Phase III, mining permits. 2011 marked a significant increase in permitting activity for DEC. With continued development of templates and guidance, as well as a more comprehensive communications plan with EPA, DEC was able to more quickly develop and issue permit authorizations in 2011.



EPA continues to review and comment on draft permits. While many of the EPA comments do not need to be addressed (they are not revisions required by the Clean Water Act), DEC strives to incorporate most of them. In some cases, EPA is asking DEC to address long standing issues that were left unresolved by EPA in previous permits. These issues are addressed through improved communication, along with an elevation process whereby an unresolved issue is elevated to DEC and EPA management immediately for resolution.

DEC continues to fine tune permitting checklists and templates to streamline the permit issuance process and issue legally defensible permits; draft permits are posted on DEC's web page; and potentially affected Tribes, the public, and EPA are notified when a permit is available for review, encouraging early input and fostering transparency in permitting decisions. Finally, all required APDES data are reported to EPA's national database, and DEC's web pages continue to be updated to better serve permittees and the public.

### **Permitting Activities**

DEC developed a two-year Permit Issuance Plan that identifies the schedule of permits proposed to be issued in 2011 through 2012. DEC is updating the Permit Issuance Plan to reflect permits proposed to be issued in 2012 through 2013. The updated plan will be available for review on DEC's web page: <http://dec.alaska.gov/water/wwdp/index.htm>.

In 2011, DEC issued 940 permit authorizations. Of that total, 926 were authorizations under general permits, five were Clean Water Act section 401 certifications of EPA-issued NPDES permits, three were APDES general permits, and six were APDES individual permits. Twenty-two APDES permits and one pretreatment program are either under development or undergoing internal review prior to public notice, and two are undergoing public review. DEC is working with EPA to provide Clean Water Act section 401 certifications of three draft NPDES oil and gas permits that EPA intends to issue before transfer of authority of Phase IV facilities.

Additionally, DEC issues approximately 1100 authorizations under the small placer mining general permit per year. The number of authorizations varies year to year depending on the interest in recreational gold mining. Each authorization is valid for five years or until the general permit expires.

### **Compliance and Enforcement Activities**

DEC conducted 152 inspections from January 1, 2011 through December 31, 2011. Facilities inspected included municipal domestic wastewater treatment plants, seafood processors, and construction sites. Of that total, 145 were APDES permitted facilities, three were unpermitted facilities, three were joint

inspections with EPA, and one was an inspection of an NPDES facility. DEC completed an inspection report and provided a response to the permittee within 37.8 days on average, more timely than EPA has traditionally done.

Based on the inspections, thirty-four compliance letters and eighteen Notices of Violation were issued. Follow up enforcement actions, where appropriate, are pending.

### **Program Capacity Development**

DEC continued to implement several components of its capacity building plan to ensure adequate staffing and training to implement the APDES program. In 2011, staff participated in 32 formal training opportunities and 12 public outreach events, such as technical conferences. DEC successfully recruited nine staff in the permitting and compliance programs. The program is actively recruiting for one current vacancy.

In addition to permitting and compliance work for dischargers in Phases I-III, staff will continue to receive classroom training and conduct joint inspections with EPA for Phase IV facilities during the coming year. DEC is beginning to draft oil and gas Phase IV permits to issue after authority for Phase IV facilities transfers to DEC.

On November 28, 2008, a petition (*Akiak et al v. US EPA*) challenging EPA's approval of Alaska's NPDES primacy application was filed with the U.S. Ninth Circuit Court. The petitioners included several Tribal councils, Cook Inlet Keeper, Alaska Center for the Environment, Alaska Community Action on Toxics, the Center for Biological Diversity, and the Center for Water Advocacy. The petitioners claimed that the state's program does not comply with 40 CFR §123.30 (judicial review of permits), because the state's 'loser pays' rule will deter potential litigants from challenging a permit decision in court. The petitioner also challenged the program based on the absence of administrative penalty authority and the loss of tribal consultation. DEC filed to intervene in the case in support of EPA's decision. On November 4, 2010, the U.S. Ninth Circuit Court denied the petitioners' claims challenging EPA's approval to transfer the NPDES Program to Alaska. The petitioners requested en banc review of the decision. The court denied the petitioners' request for a review and the original decision stands. The case is closed. EPA's approval to transfer the NPDES program to Alaska was upheld.

January 23, 2012

DEC looks forward to continuing to implement the APDES program in Alaska to ensure protection of our valuable water resources through issuance of current, protective discharge permits, a robust inspection program, and timely and predictable enforcement actions to ensure compliance. We are prepared to answer any questions you may have about the APDES program.

Sincerely,



Michelle Bonnet  
Director

cc:

Governor Sean Parnell  
Mike Nizich, Chief of Staff, Office of the Governor  
Randy Ruaro, Deputy Chief of Staff, Office of the Governor  
Heather Brakes, Legislative Director, Office of the Governor  
Kirsten Waid, Senate Secretary, Alaska State Legislature  
Suzi Lowell, House Chief Clerk, Alaska State Legislature